No. 99-235

(3)

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In The

SUPREME COURT OF THE UNITED STATES

ROGER DEMASSE; MARIA A. GARCIA;
BILLY W. JONES; VIOLA MUNGUIA;
GREG PALMER; and SOCORRO SOZA
Petitioners,

v.

ITT CORPORATION, a Delaware
corporation, dba ITT CANNON
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Second Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

I. Interlocutory Issues May Be Reviewed:

Although there has been no final judgment entered in this case on the substantive issues (i.e., Respondent's breach of contract), now that this case has been ordered remanded by the 9th Circuit to the U. S. District Court for a trial, a decision on whether Petitioners are entitled to a trial by jury would, clearly, be far more beneficial to the parties if it were rendered now rather than following an appeal and review at the end of the entire case.

28 U.S.C. §1254 gives this Court jurisdiction to review by Writ of Certiorari interlocutory matters. Thus, in Nixon v. Fitzgerald, 457 U.S. 731 (1982); in Coleman v. Paccar, Inc., 424 U.S. 1301(1976); in Federal Power Commission v. Transcontinental Gas Pipeline Corp., 423 U.S. 326 (1976) and in Air Line Pilots Assoc., Intern. v. UAL Corp., 897 F.2d 1394 (7th Cir. 1990), it has been held that the Supreme Court may review interlocutory orders under its certiorari jurisdiction.

Proceeding in a manner suggested by Respondent would be a waste of judicial resources and expose the parties to needless additional expense with no corresponding benefit to either the parties or the judicial system. Petitioners have properly appealed a final decision of the U.S. District Court below denying their right to a trial by jury. They presented their issue to the Ninth Circuit, which entered its order affirming the U. S. District Court on the jury-trial issue. (See Appx. A of Petition)

It is submitted that, although the substantive issues in the case are still unresolved, the issues presented herein are uniquely ripe for review and decision now that Petitioners' case has been remanded for trial. The Constitutional issues and the proper interpretation of the Federal Rules of Civil Procedure need to be addressed at this time so that Petitioners and other litigants in our Federal judicial system will not be deprived of their Seventh Amendment rights and so that lower Federal courts can receive guidance from this Court on these issues of considerable importance.

II. The Affidavit Filed by Petitioners' Counsel:

In its brief in opposition, Respondent attempts to portray Petitioners' counsel below as one who intentionally attempted to deceive the trial court by filing a false affidavit. Such accusation is not only unsupported by the record, but, to the contrary, the Court below expressly found that counsel's affidavit *"did not appear to the Court to be an intentional false statement made under oath."* (See Appx. C, p. 6, f.n.1 of Petition). Furthermore, the record in this case shows that the basis for the Court's denial of Petitioners' request for a jury trial was clearly counsel's "inadvertence" in failing to comply with Rule 38(b) in a timely manner and not the inaccuracies in counsel's affidavit. (See Appx. C, p. 8-10, of Petition). Counsel's affidavit, which attempts to explain his forgetfulness, while inaccurate, was based upon his honest and best recollection of events occurring many months earlier. When the errors in the affidavit were brought to counsel's attention, a

detailed letter of explanation and apology was promptly sent to Judge Silver. (See Appx. A of this Brief).

III. Respondent's Accusation of Forum Shopping is Illogical:

Respondent's argument alleges that Petitioners were "forum shopping," i.e., that the failure of Petitioners to timely seek a trial by jury was a knowing, intentional, and purposeful waiver. Their theory is that Petitioners initially did not want a jury trial but, instead, wanted a trial to the Court before District Judge Roger G. Strand, who was initially assigned to this case. According to Respondent, when the case in the Court below was later transferred to District Judge Rosalyn O. Silver, Petitioners then decided they did not want their case decided by Judge Silver, but would rather have it decided by a jury.

Had this, in fact, been Petitioner's motivation, it would have been far easier for them to simply file a Motion under Rule 39(b) on the very grounds suggested by Respondents, rather than seek a jury trial on a claim of "inadvertence." It is

submitted that, under the circumstances of a sudden change of judge, a far more compelling argument could have been made for the granting of such relief than by relying on a claim of inadvertence. Petitioners' motivations are not nearly as complicated as Respondent believes. The simple truth of the matter is that Petitioners' counsel simply forgot to file a demand for a jury trial within the time limits imposed by Rule 38(b) and Petitioners believe they should not be denied their Seventh Amendment rights because of such unintentional, inadvertent conduct.

CONCLUSION

The record in this case fully supports an unintentional, inadvertent failure to comply with Rule 38(b). There would be no useful purpose served by the Court's rejection of the Petition herein merely because there is no final judgment on the substantive issues in this litigation. To the contrary, in view of the present posture of the case, it would be far better to resolve the issue of Petitioners' right to a jury trial before the case is

remanded for a trial, than after. Furthermore, in light of the divergent views among the Circuits, the issues raised herein have important implications for our Constitution, for the Federal rules of Civil Procedure, and for all civil litigants in our Federal judicial system. The Court should accept this Petition and bring resolution to these issues.

RESPECTFULLY SUBMITTED this 24th day of September, 1999.

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APPENDIX

A. LETTER TO JUDGE SILVER DATED APRIL 12, 1995

April 12, 1995

Judge Roslyn O. Silver
United States District Court
District of Arizona
6031 U.S. Court House
230 North 1st Avenue
Phoenix, AZ 85025-0006

Re: Betty L. Allen et al v. ITT Corporation, a Delaware corporation dba ITT Cannon
Cause No.: CIV 94-267 PHX ROS

Roger Demasse v. ITT Corporation, a Delaware corporation dba ITT Cannon
Cause No.: CIV 94-01399 PHX ROS

Dear Judge Silver:

As you might know I was terribly embarrassed by your bringing to my attention that there were two cases, Moon v. United Welfare and Risley v. UNAM Life, that had been filed in the U.S. District Court in 1993, wherein I had been the attorney of record and which I could not recall at the time I filed an Affidavit which stated that I had not practiced in the U.S.

District Court for at least 20 years before the filing of the Complaint in this case.

When I was confronted by the information that the Court had obtained from it's records, I, at first, thought that I must be losing my mind (or certainly my memory). The early signs of Alzheimer's occurred to me and I was really quite concerned and distressed about it. Recently I have discovered why this group of cases that you found in the records did not register with me at the time I was preparing my affidavit. My license was suspended from April 18 thru October 21, 1993 and I was not practicing during that period of time. The Moon v. United Welfare and the Risley v. UNAM Life were not filed by me, nor did I assume responsibility for these cases until January, 1994. (See attached pleadings) This period of time was one of greatly personal turmoil for me and in reflecting back over this it is difficult for me to actually remember much of anything that occurred, probably due to "emotional blocking" of memories arising out of my suspension that are, from a professional standpoint, terribly painful for me.

I began my involvement in the Allen and Demasse matters during the summer of 1993 while working as a Legal Assistant for attorney James Hill. After my reinstatement I continued to assist Mr. Hill in these cases and eventually became lead counsel.

As time passed and my memory concerning the sequence of events became somewhat blurred, it seemed to me that

because of my involvement in the Allen and Demasse matters in 1993, these cases had been filed before I became counsel of record in the Risley v. UNAM and the Moon v. United Welfare cases. Similarly, I believed that the Allen and Demasse cases had also been filed before Oliver v. Intel. Although, my memory was off it was off by only a few weeks in Moon and Risley, and only a few days in Oliver. (See attached pleadings)

Although I realize that the appearance of a reckless disregard for the truth may have been present when you merely compare my Affidavit with the filing dates of the cases that I have appeared in, however, when you examine the file in these cases you will see that my involvement in these cases did not take place until the early part of 1994. For example in CIV 93-1040-PHX-RGS, Risley v. Unam Life Insurance Company although this action was filed on June 1, 1993 it was filed by attorney James W. Hill, who remained the attorney of record in the case until January 16, 1994 when I was substituted. If you examine the Complaint in the Allen and Demasse cases you will see that I signed the Complaint on January 21, 1994 and with the passage of time and the blurring of my memory it seemed to me that my involvement in the Risley case came at or about the same time as my involvement in the Allen and Demasse cases.

In view of the Court's reaction to the attached Demand For Jury Trial filed by me in Miller v. State Farm, I believe the Court may have missed the point regarding my basis for requesting leave to file a late demand for trial by jury in this case.

I did not mean to suggest that I did not know about Rule 38(d), dealing with waiver of one's right to trial by jury by failing to file a timely demand, I was merely advising the Court that I temporarily forgotten about this requirement at the time I filed the Complaint in this particular case. Thus, it is submitted that the fact that I remembered to file a demand for a jury trial in Miller v. State Farm, does not in any way detract from my position that I was temporarily forgetful, but to the contrary, it would tend to strongly support it and to support the inference that this was merely an inadvertent waiver and not a knowledgeable and intentional waiver.

In any event I want to assure you that I did not intend to mislead the court or my adversary. It was simply a matter of a flawed memory due to a combination of unusual circumstances that lead me to believe that these cases were the first that I had handled in the U.S. District Court in many years.

I sincerely apologize to the Court for the errors in my Affidavit and for the dismay and disappointment that I know this must have caused you and I hope the court will have the compassion to forgive me.

I am at this point very concerned about the impact that all of this may have on the Courts ability to impartially judge my client's cases, particularly, in view of the courts denial of my clients' Request for a Trial by Jury. If there is any doubt at all about this issue in the Court's mind I would feel obliged to

withdraw so that my client's rights will not be prejudiced in any way by these events.

Sincerely yours,

Jack Levine

JL/gc
Enclosures
cc: Teresa Forest, Esq.